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No. 147

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

W. H. GARRETT,
Petitioner,

vs.

SOUTHERN RAILWAY COMPANY.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, W. H. Garrett, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this cause on April 22, 1960.

OPINIONS, JUDGMENTS, AND ORDERS BELOW.

A copy of the opinion of the District Court and a copy of the judgment of the District Court are appended in the appendix hereto (A. 13-22).

(The abbreviation "A." refers to the appendix to this petition.)

Likewise included in the appendix hereto is the judgment of the Court of Appeals (A. 26).

The opinion of the Court of Appeals has not been published but such opinion is set forth in the appendix (A. 23-26).

Upon motion made by petitioner, said Court of Appeals stayed its mandate on said judgment upon condition that a petition for writ of certiorari be filed with this Court.

JURISDICTION.

Jurisdiction to review by writ of certiorari the judgment of said Court of Appeals entered April 22, 1960, is invoked under the provisions of 28 U. S. C. A., Section 12 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Is Lenoir Car Works the alter ego, adjunct, subsidiary, agent, or instrumentality of Southern Railway Company, performing its necessary functions and work, in consequence of which an individual, nominally employed by Lenoir Car Works, may seek damages from Southern Railway Company, for personal injury sustained in the performance of his work, under the terms and provisions of the Federal Employers' Liability Act?

2. Does Southern Railway Company exercise such control over Lenoir Car Works as to require a determination that Southern Railway Company is the employer of petitioner within the meaning of the Federal Employers' Liability Act?

STATEMENT OF THE CASE.

I.

Basis for Federal Jurisdiction in the United States District Court.

The basis for Federal jurisdiction in the United States District Court of the original complaint is an Act of the Congress of the United States, Title 45, U. S. C., Sec. 51, et sequi.

II.

Statement Respecting Litigation.

The abbreviation "R" used herein will refer to the certified record filed in this court.

Lenoir Car Works, a Tennessee corporation, engages in the manufacture of railroad car wheels, and other railroad appliances, in Lenoir City, Tennessee. It employed petitioner W. H. Garrett, who developed silicosis in the course of his work as a molder of car wheels (R. 56).

Petitioner Garrett respectfully submits that he is entitled to maintain an action against Southern Railway Company, for his injuries, in that (1) Lenoir Car Works is the alter ego, adjunct, subsidiary, agent or instrumentality of Southern Railway Company, performing its necessary functions and work, and, (2) Southern Railway Company exercises such control over Lenoir Car Works as to require a determination that it was his employer.

Petitioner lists herewith, seriatim, the various factors which he relies upon to substantiate the foregoing assertion.

Hereinafter Lenoir Car Works will be referred to as "Lenoir", and Southern Railway Company will be referred to as "Southern".

1. Lenoir was incorporated in 1904 for the purpose of "manufacturing raw materials . . . for the purpose of manufacturing railroad cars and utensils . . ." (R. 46). When incorporated Lenoir was granted the power of eminent domain.

2. Southern acquired all capital stock of Lenoir in 1904, and has since owned all of the outstanding capital stock of Lenoir (R. 46). Since this acquisition by Southern,

Lenoir has been operated as a steel foundry, brass foundry, and wheel foundry for the manufacture of car wheels, and steel and brass castings for railroad cars and locomotives (R. 47). The large percentage of the output of Lenoir is purchased by Southern, and its affiliate companies, though some small percentage is sold to customers other than Southern (R. 47).

3. Southern maintains complete domination and control of Lenoir by appointing certain of its personnel as the officers and directors of Lenoir. The chart below suffices to show the relationship.

Officers.

Officers of Lenoir Car Works	Position Held With Southern Railway Company
President:	Chief Clerk
Vice-President	Special Assistant in Vice-President's Office
Secretary	Asst. Secretary
Treasurer	Treasurer

(R. 77, R. 104.)

Directors.

Position Held With Southern Railway Company
Chief Clerk
Special Assistant in Vice-President's Office
Teller
Employee
Employee

(R. 75, R. 104.)

None of the officers reside in Tennessee, but conversely live in and around Washington (R. 77a).

None of the officers receive any compensation from Lenoir, though pay-roll drafts are prepared at Lenoir for salary payments (R. 78a).

None of the directors reside in Tennessee, but live in and around Washington. A directors' meeting is never held in Loudon County, Tennessee (R. 76a).

Southern owns and operates many lines of interstate railroad (R. 45a).

This system thus owned and operated by Southern is commonly referred to as "Southern Railway System" (R. 46a). As shown by Southern Railway Company's 1958 Annual Report (Exhibit 13), Southern Railway Company indicated by chart its various subsidiary corporations, with the notation at the bottom of the chart, "Note: Control 100% or as indicated". **Lenoir is listed as one of the non-railroad companies owned by Southern over which it exercises 100% control.**

Since 1930 Southern has acquired from Lenoir the greater part of the car wheels and castings needed by it for the repair and maintenance of its cars and locomotives (R. 48a).

Sales are made by Lenoir to Southern on the basis of a bid price, or negotiated price (R. 49a). However, the final price is determined by Southern's accounting office in Washington, to which is sent the estimate of cost of the wheels (R. 86a). Southern thus fixes the price which it will pay for wheels (R. 87a). Southern retains the right to suggest to Lenoir that it lower its bid in order to meet competition from other companies (R. 88a). If identical bids are received by Southern from Lenoir and others, a preference is given to Lenoir (R. 114a).

Lenoir has no formula for: "mark up" to determine profit. Again, the final price of the finished product, is fixed by the Washington office of Southern (R. 87a-88a).

Lenoir utilizes the services of the purchasing department of Southern, having no independent purchasing agent within its organization (R. 81a).

Lenoir employs no salesmen, does no advertising in periodicals, nor trade journals (R. 86a).

In manufacturing car wheels Lenoir utilizes blue prints and specifications owned by Southern (R. 84a).

In making shipments to Southern, Lenoir attempts to utilize Southern's cars (R. 93a).

Occasionally orders placed by Southern to Lenoir have been cancelled. However, no claim has ever been made by Lenoir against Southern in consequence of such a cancellation (R. 91a). In fact, no claim has ever been made by Lenoir against Southern as a result of their multiple contractual relations (R. 71a).

On occasion Lenoir sends it mail, free of postage, through the facilities of Southern (R. 95a).

Formerly Southern granted complimentary passes to certain of the key personnel of Lenoir for intra-state travel. However, this practice was discontinued when the Union demanded that its members receive similar passes (R. 96a).

Insurance carried on Lenoir's buildings is procured by Southern. Periodic inspections of the buildings are made by a fire inspector employed by Southern (R. 98a).

Employees of Lenoir, and employees of Southern belong to the same union (R. 99a).

Lenoir maintains an office in the Southern Railway Building, in Washington, D. C. (R. 81a).

Claims arising out of injuries to employees of Lenoir are investigated and adjusted by a claim department main-

tained by Southern, under the supervision of a legal department, similarly maintained by Southern. Southern's legal department conducts the defense of all litigation stemming from such claims (R. 49a).

Salaries of the personnel comprising the claim department, the legal department, and the general accounting department are paid by Southern (R. 49a).

Periodically, Lenoir makes a payment to Southern for certain of the services rendered by Southern in its behalf. However, Lenoir is not required to, and does not reimburse Southern for the legal services and the claim services, which are afforded it, free of charge, by Southern (R. 50a).

The salary received by Lenoir's claim agent, and Lenoir's attorney (likewise Southern's claim agent and attorney), is by draft of Southern Railway (R. 60a).

When an accident occurs at Lenoir, a report is made to Southern's claim agent who is referred to as "District Claims Agent, Southern Railway" (R. 62). The report of the claim agent's investigation is forwarded to the chief claim agent, for Southern Railway, Washington, D. C. (R. 63a).

The office maintained by the claim agent for Lenoir is in the Southern Railway Building, in Knoxville, Tennessee (R. 71a).

Employees of Lenoir have had portions of their pay deducted, pursuant to the provisions of the Railroad Retirement Act, since 1935 (R. 101a). This followed a hearing conducted by the Railroad Retirement Board (R. 101a). In the hearing **Southern conceded that Lenoir had been controlled by it during Lenoir's entire existence** (R. 216a).

III.

ARGUMENT—REASONS FOR GRANTING THE WRIT.

A.

Lenoir Is the Alter Ego, Adjunct, Subsidiary, Agent, or Instrumentality of Southern, Performing Its Necessary Functions and Work.

Petitioner engaged in the manufacture of car wheels, utilized by Southern, and in doing this work was engaged in "commerce"; within the intendment and meaning of 45 U. S. C. A., Sec. 51, et sequi. **Southern Pacific Co. v. Gileo, 351 U. S. 493.**

Petitioner asserts that Lenoir's corporate entity will be disregarded when its recognition will result in an inequity, and will produce unjust consequences.

In **Byrne, Administratix v. Pennsylvania R. R. Co., 262 F. (2d) 906 (C. A. 3, 1958)**, plaintiff's intestate was employed by Westinghouse Electric Corporation. He was killed while working on a locomotive built by Westinghouse, and purchased by Pennsylvania. Plaintiff's intestate was held to be an employee of Pennsylvania, within the meaning of the Federal Employers' Liability Act.

The Court in **Byrne, Admrx. v. Pennsylvania R. R. Co.**, supra, quoted with approval from **Cimorelli v. New York Cent. R. R. Co., 148 F. (2d) 575 (C. A. 6, 1945)**. In this case the Court remarked that: "the test of who has the 'right to control' the activities of the workman is the generally accepted criterion determining employment status . . ."

The right to control petitioner's activities was vested in Southern. The officers and directors of Lenoir were chosen by Southern, and for the most part held positions

in Southern's office in Washington. Southern conceded in the examination conducted by the Railroad Retirement Board, in 1938, that it had controlled Lenoir during its entire existence. Southern, in its 1958 annual report, asserted that it exercised 100% control of Lenoir. Clearly, with the concession and statements afore-referred to, and with the other indicia of control hereinbefore referred to, Southern must be said to have the "right to control" the various employees of Lenoir.

Southern has its own reason for attempting to maintain Lenoir as a separate corporate entity.

Awards made under the Tennessee Workmen's Compensation Act are relatively small in comparison with those made under the Federal Employers' Liability Act. By example, petitioner would be entitled to receive $8,500.00 for permanent and total disability resulting from silicosis, pursuant to 1932 Williams Tennessee Code Anno., Sec. 6878, Sub. Secs. (d) (e). This limitation, thus provided by the Tennessee Act, would suffice to save Southern many thousands of dollars.

A similar factual situation to that at Bar was considered in **Southern Railway Co. v. Crosby, 201 F. (2d) 878, (C. A. 4, 1953).** Crosby, a brakeman, was killed in the derailment of a train operated on the line of the Yadkin Railroad Company. Southern then contended that Crosby was an employee of Yadkin. The Court repelled this insistence, holding that the operations on the line of the Yadkin were nothing more than a part of the operations of Southern. The Court further stated:

> "Defendant may not escape liability for torts committed in carrying on the business merely because the cost thereof is allocated to the corporation that owns the track over which the movement was effected . . . where one railroad company actually controls another and operates both as a single system, the dominant

company will be liable for injuries due to the negligence of the subsidiary company."

As a matter of interest, Southern in its 1958 report (Exhibit 13) listed the Yadkin Railroad Company as one of its systems over which it exercised "two-third" control. By contrast it claims 100% control of Lenoir.

The instrumentality rule has been used by this Honorable Court, as not properly being a rule, but "a convenient way of designating the application, in particular circumstances, of the broader equitable principle that the doctrine of corporate entity . . . will not be regarded when so to do would work fraud or injustice." **Taylor v. Standard Gas & Elec. Co., 306 U. S. 307, 322 (1939).**

The general rule is clear that subsidiaries cannot be used to evade statutes and statutory regulation. This has been applied to railroads many times. Thus, in hauling, the statutes relating to commodities, when the subsidiary was run by the same manager, the railroad was found to be handling its own commodities. **United States v. Reading Co., 253 U. S. 26 (1920); United States v. Lehigh Valley R. Co., 254 U. S. 255 (1920).** The corporate entity will be disregarded to avoid tax evasion. **Higgins, Collector v. Smith, 308 U. S. 473 (1940).**

When a railroad owned another railway, and the subsidiary railway owned terminal tracks in a city, it was held that the subsidiary could not charge separate fees to the travelling public. It was said that the parent did not own the stock simply to participate in the subsidiary in the normal and usual manner, but for the purpose of controlling the subsidiary. **Chicago, Milwaukee & St. Paul R. Co. v. Civic and Commerce Association, 247 U. S. 490 (1918).**

In **Sinkler v. Missouri P. R. Co., 356 U. S. 326, 2 L. Ed. 2d 799, 78 S. Ct. 758,** it was held that employees of a belt

railroad were, for the purposes of Federal Employers' Liability Act, a part of the respondent's total enterprise.

In **Erie R. Co. v. Krysienski, 238 F. 142, 145 (C. A. 2, 1916)**, it was held that a subsidiary was as much a part of the railroad's business as "are the several departments of the modern store a part of the store business, though each department is owned by its manager who is not liable for the store's debts."

Southern, exercising 100% control of Lenoir, obtains a needed product at a cost price, which its own accounting office fixes, and in addition, avoids the payment of awards to its employees, under the provisions of Federal Employers' Liability Act, the benefits being limited by the terms of the Tennessee Workmen's Compensation Act.

Lenoir's Incorporation, Prior to the Enactment of the Federal Employers' Liability Act, Does Not Prevent the Application of Title 45, U. S. C. A., Section 55.

In **Philadelphia, B. & W. R. Co. v. Shubert, 224 U. S. 603 (1912)**, this Court stated that the fact that the device had pre-existence did not limit the power of Congress to make pre-existing contracts, regulations, rules, or devices unavailable as a defense, since this would put the control of interstate commerce into private hands.

B.

Southern Exercises Such Control Over Lenoir as to Require a Determination That Southern Is the Employer of Petitioner Within the Meaning of the Federal Employers' Act.

Petitioner received his orders from individuals nominally in the employment of Lenoir. Nevertheless, all policy making, and hence all control of Lenoir is exercised by employees of Southern. It has been held that

when a railroad exercises control over an independent contractor, the employees of the contractor will be deemed to be the employees of the Railroad within the meaning of the Federal Employers' Liability Act.

Cimorelli v. New York Cent. R. Co., 148 F. 2d 575 (C. A. 6, 1945); Pennsylvania R. Co. v. Roth, 163 F. (2d) 161 (C. A. 6, 1946); Pennsylvania R. Co. v. Barlion, 172 F. 2d 710 (C. A. 6, 1949).

In each of these cases the Railroad employed a contractor to perform railroad work, and exercised control over many parts of the work. Though there was no corporate relationship between the Railroad and the contractor, it was determined that the control exercised by the Railroad sufficed to allow benefits to the contractor's employees, from the Railroad, under the terms of Federal Employers' Liability Act.

To the same effect see **Seinkler v. Missouri-Pac. R. Co., 356 U. S. 326, supra.**

CONCLUSION.

For the reasons herein stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX.

Opinion of District Court.

Judgment of District Court.

Opinion Court of Appeals.

Judgment Court of Appeals.

OPINION OF THE DISTRICT COURT

Memorandum.

(Filed May 8, 1959.)

The plaintiff in this case was employed as a wheel moulder by Lenoir Car Works, a Tennessee corporation. He claims injuries from silicosis contracted from silica dust permeating the foundry. But the questions whether he had silicosis, and the amount of injury, are not reached in this phase of the case.

The sole question here is whether defendant, Southern Railway Company (hereinafter referred to as Southern), which acquired the entire capital stock of Lenoir Car Works (referred to hereinafter as Lenoir) in 1904, the year of the latter's organization, so completely dominated Lenoir that the latter was but an adjunct, or instrumentality, of Southern. If it did, then the complainant would, for the purpose of this case, be an employee of Southern and would be entitled to recover under the Federal Employer's Liability Act. Because there is a real question that Lenoir is but an instrumentality of Southern, the plaintiff in order to protect his rights, has also brought suit in the State courts against Lenoir for Workmen's Compensation.

The general rule is that stock ownership alone by one corporation of the stock of another does not thereby render the dominant corporation liable for the torts of the subsidiary unless the separate corporate existence of the subsidiary is a mere sham, or unless the control of the subsidiary is such that it is but an instrumentality or adjunct of the dominant corporation. **Sheridan v. Pan-American Refining**, 123 F. Supp. 81 (D. C. N. Y.). The general rule is also stated in an Annotation appearing in

50 A. L. R. 611. See also **Kentucky Electric Power Co. v. Norton**, 93 Fed. 2d 923, 926 (C. C. A. 6). Whether the subsidiary is an instrumentality of the owner corporation is a question to be determined from all the surrounding circumstances. **Fletcher Cyclopedia Corporations**, Sec. 43 (p. 157), Sec. 6222; **Berkey v. Third Ave. R. Co.**, 244 N. Y. 84, 50 A. L. R. 599 (opinion by Cardozo); **Costan v. Manila Electric Co.**, 24 Fed. 2d 383, 384 (C. C. A. 2). Items to be considered in reaching such a determination are common directorships, common officers, common fiscal set up, etc.

The plaintiff relies upon the following circumstances:

That all directors and officers of Lenoir are employees of Southern and live in Washington; that Southern owns all the stock of Lenoir except five qualifying shares; that between 1942-1957 Lenoir sold to Southern, or its affiliates, over 30 million dollars worth of its products while selling approximately four and a half million to outside purchasers; that all profits of Lenoir went to Southern; that all claims of Lenoir employees for accidents are handled by the claim's office of Southern; that all litigation against Lenoir is handled by Southern's attorneys; that general accounting of Lenoir is handled in Washington by personnel of Southern; that the Railroad Retirement Board decided that employees of Lenoir were entitled to benefits under the Railroad Retirement Act because of the relationship between Lenoir and Southern; that Lenoir has the power of eminent domain; and that on May 13, 1904, the Board of Directors of Southern authorized the purchase of the entire capital stock of Lenoir.

Our question is whether these factors would establish Lenoir as the mere creature of Southern. The defendant railroad says that these matters are not controlling and to sustain its position emphasizes the following facts:

That although Lenoir sells the majority of its products to Southern or its affiliates, it does not sell to them exclusively and in the fifteen-year period prior to the suit sold twelve per cent to other customers; that Lenoir maintains its offices and business in Lenoir City, Tennessee, although it concedes that the corporate and accounting offices are in Washington in a building owned by Southern; that the management of Lenoir is vested in a manager, Henry Marius, who has held the position continuously since July 1, 1945, is paid by Lenoir, and although he holds and votes the proxy of Southern at the annual stockholders' meeting, he has no other connection with Southern; that never has any individual served at the same time as a Director of Lenoir and Southern; that the work of Lenoir is a specialty and in the last 20 years no official or supervising employee of Southern has by training, or experience, been in a position to direct or supervise the operation of such a business; that Southern has not purchased all its wheels, steel and brass castings from Lenoir, but has bought substantial amounts from others; that Southern has followed the custom in the trade as to price quotations and supplying scrap material in its dealings with Lenoir, and all sales to Southern have been upon the basis of a bid price or negotiated price; that in every case Southern obtains bids from several manufacturers and purchases from the lowest bidder; that the manager of Lenoir establishes the prices of all prospective purchases, including that of Southern; that the manager expects to make a profit and is not informed by Southern of bids of its competitors even when the prices are negotiated; that bids are revised sometimes, but never with knowledge of the bids of competitors; that all sales are the result of the business judgment of the Manager and not the result of threats, persuasion or intimidation by Southern; that at no time has any individual occupied the same official position in both companies with the exception of corporate and

financial officials; that Lenoir has since 1919 been a duly qualified employer under the Tennessee Workmen's Compensation Law and with the exception of this and several similar suits has settled all claims made under and covered by the Tennessee Workmen's Compensation Law; that Lenoir maintains a separate bank account and has never intermingled its funds with those of Southern; that the companies keep separate books and Lenoir pays its own taxes; that Southern issues no passes to the manager or any other employee of Lenoir; that Lenoir owns no track or rolling stock, publishes no tariffs, files no reports with the Interstate Commerce Commission and uses no facilities or property jointly with Southern; that claims of employees are investigated and settled by the Claim Department of the Southern Railway System, which likewise defends claims litigation; that the general accounting of Lenoir is handled by the Accounting Department of the Southern Railway System, but local accounting is handled by Lenoir employees at Lenoir City; that salaries of employees of the System doing this general work are paid by Southern, but reimbursement of its fair proportionate part thereof is made by Lenoir and other members of the System at monthly intervals, and that the share of Lenoir is $2,000.00 monthly; that Lenoir makes separate collective bargaining agreements with its employees and there is no interchange of seniority between operations of Lenoir and the railroad, or vice versa; that Lenoir has its own legal counsel in Lenoir City, selected by its manager in addition to the use it makes of the Legal Department of the System.

Counsel have been commendably frank and candid in the pre-trial conference, and in answering interrogatories and filing exhibits. The factual data before the Court is not in conflict. The Court's responsibility is to determine whether Lenoir is operated as a sham for Southern, or as the instrumentality, or as an adjunct of its operation.

The facts set forth above outline with singular sharpness the relation between the two companies. The Court finds the existence of two distinct operations. There is no evidence that Southern dictated the management of Lenoir. In fact, the evidence indicates that Henry Marius was in full control of the operation. He established prices. He handled all negotiations in collective bargaining agreements. Lenoir paid local taxes, had local counsel, maintained Workmen's Compensation. There is no evidence that Lenoir was run solely for the benefit of Southern. In fact a substantial part of its requirements in the field of operation of Lenoir were bought elsewhere. Lenoir sold substantial quantities to other companies. It operated no rolling stock and had nothing to do with the transportation business.

The situation here is not like that in **Southern Pacific Co. v. Gileo**, 351 U. S. 493, where the railroad itself operated a wheel foundry. The only question there as to employee Aranda was whether his duties as a wheel moulder served to further interstate commerce. The Supreme Court decided he was entitled to the benefit of the Federal Employer's Liability Act.

But before the Gileo decision applies here we must first determine whether Lenoir was operated so tightly by Southern that it was an agency or instrumentality of Southern. In our opinion it was not. Policy decisions and pricings remained in the hands of Marius. Certain accounting and claims work was done in Washington to eliminate duplication. But there is no evidence that policy decisions of Lenor were made or dictated by Southern. Marius operated the business as a going concern in the fields it was equipped to handle. Where Southern, or the Southern Railway System, did work for Lenoir there was careful accounting and adjustment of costs at the end of each month. The facts do not reveal the intimacy and

inseparability of control which would lead the Court to hold that Southern and Lenoir were one and the same. There is no such control here as in **Costan v. Manila Electric Co.** (supra).

Lenoir was not in the words of the Act "a common carrier by railroad." It was not performing what have been called non-delegable duties of the railroad. It was not an operator of a terminal, performed no switching or transportation functions at all. It was a manufacturer and plaintiff was one of its employees. It was hence not an "agent" of Southern in the sense used in some of the cases cited by the plaintiff, since it performed no common carrier operations: **Chicago, M. & St. P. Ry. v. Minn. Civic Assn., 247 U. S. 490; Davis v. Alexander, 269 U. S. 114; Sinkler v. Missouri Pacific R. Co., 350 U. S. 318.**

Defendant manufactured car wheels, bearings of various kinds and items of a related nature. Southern could produce such items for its own use and if it did so, would be liable in tort under the F. E. L. A. for accidents occurring in the activity. But Southern did not manufacture these things in its own plants. Although necessary to keep its rolling stock in good repair, the items could be purchased anywhere. In fact the evidence indicates that substantial purchases of these products were made elsewhere. If purchased of a completely independent company, no claim could be made that such company was an instrumentality of Southern.

The question only arises because of the ownership of Lenoir by Southern and because of the other relationships listed above. We come back to the question whether the control was such as to make Lenoir a mere adjunct of Southern. We repeat again that it was not. **Friedman v. Vandalia R. Co., 254 Fed. 292, 294 (CCA 8); Atlantic Coast Line v. Shields, 220 Fed. 2d 242, 246 (CCA 5).**

In a case not involving a tort the Court of Appeals for the Sixth Circuit has set down the following guide lines. **Kentucky Electric Power Co. v. Norton Coal Mining Co., supra:**

> "On the other hand, it is likewise well settled that a corporation is ordinarily an entity, separate and apart from its stockholders, and mere ownership of all the stock of one corporation by another, and the identity of officers of one with officers of another, are not alone sufficient to create identity of corporate interest between the two companies or to create the relation of principal and agent or to create a representative or fiduciary relationship between the two. If such stock ownership and potential control be resorted to only for the purpose of normally participating in the affairs of the subsidiary corporation in a manner usual to stockholders and not for the purpose of taking some unfair advantage of the subsidiary or using it as a mere adjunct to the main corporation or as a subterfuge to justify wrongdoing, their identity as separate corporations will not be disregarded but their respective rights when dealing with each other in respect to their separate property will be recognized and maintained. The extent of stock ownership and mere potential control of one company over another has never been regarded as the determining factor in the consideration of such cases. Something must be disclosed to indicate the exercise of undue domination or influence resulting in an infringement upon the rights of the subservient corporation for the benefit of the dominant one. Otherwise, the rights of the separate corporations in respect to their corporate property must be governed by the rules applicable in ordinary cases."

This excerpt from the Kentucky Electric Power case was quoted with approval in a footnote to the case of

Taylor v. Standard Gas & Electric Co., 96 Fed. 2d 693 (CCA 10). In that case the Court in considering the indicia of control quoted at length from Powell on Parent and Subsidiary Corporation:

> "There is respectable authority for the proposition that to justify the application of the instrumentality rule between parent and subsidiary corporation, there must be present in addition to the elements of control through stock ownership and common directorates and officers, elements of fraud or wrongdoing on the part of the parent corporation to the detriment of the subsidiary and third persons in their relations with the subsidiary.
>
> "Sections 5 and 6 of Powell on Parent and Subsidiary Corporations, in part, read:
>
> 'The Instrumentality Rule, in its shortest form, may now be stated:
>
> 'So far as the question of control alone is concerned, the parent corporation will be responsible for the obligations of its subsidiary when its control has been exercised to such a degree that the subsidiary has become its mere instrumentality.
>
> 'The Instrumentality Rule is recognized in all jurisdictions in this country and our problem therefore is to determine the circumstances which render the subsidiary an "instrumentality" within the meaning of the decisions. This is primarily a question of fact and of degree.
>
> 'The circumstances rendering the subsidiary an instrumentality. It is manifestly impossible to catalogue the infinite variations of fact that can arise but there are certain common circumstances which are important and which, if present in the proper combination are controlling.

'These are as follows:

'(a) The parent corporation owns all or most of the capital stock of the subsidiary.

'(b) The parent and subsidiary corporations have common directors or officers.

'(c) The parent corporation finances the subsidiary.

'(d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.

'(e) The subsidiary has grossly inadequate capital.

'(f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.

'(g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.

'(h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.

'(i) The parent corporation uses the property of the subsidiary as its own.

'(j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest.

'(k) The formal legal requirements of the subsidiary are not observed.' ''

In the case at bar only two of the eleven listed indicia occur, namely, the ownership of most of the capital stock of Lenoir by Southern, and possibly subscription by Southern to the capital stock of Lenoir. In our opinion the principles of the Kentucky Electric Power case apply here.

and when applied we conclude that the control of Southern over Lenoir was not such as to constitute that latter an adjunct of Southern. The complaint must be dismissed.

/s/ Robt. L. Taylor,
Judge.

JUDGMENT.

(Filed May 18, 1959.)

In this case, for the reasons stated in the Court's Memorandum filed herein on May 8, 1959, it is ordered that plaintiff's suit be and the same hereby is dismissed at plaintiff's costs.

Approved for entry,

s/ Robt. L. Taylor,
District Judge.

O. K.

/s/ J. H. Doughty,
Attorney for Plaintiff.

/s/ Clyde W. Key,
Attorney for Defendant.

OPINION COURT OF APPEALS.

(Filed Apr. 22, 1960.)

No. 13,975.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

W. H. Garrett,
Appellant,
v.
Southern Railway Company,
Appellee.

Appeal from the United States District Court for the Eastern District of Tennessee.

Decided April 22, 1960.

Before: McAllister, Chief Judge; Martin, Circuit Judge; and Holland, Senior District Judge.

Martin, Circuit Judge. In this court action, a wheel moulder in the employ of Lenoir Car Works, a Tennessee corporation, brought suit against the Southern Railway Company for alleged injuries from silicosis, claimed to have been contracted from silica dust which permeated the foundry. Upon completion of the trial, at which much evidence was received, the United States District Judge entered judgment in favor of the defendant railway company. Plaintiff's appeal to this court is from that judgment. The opinion of the District Court will be found in 173 Fed. Supp. 915.

Appellant contends that the district court was in error in finding that the Lenoir Car Works was not the alter ego, adjunct, subsidiary, agent or instrumentality of the appellee, Southern Railway Company, and consequently was not required to respond in damages for the personal injuries sustained by appellant. Appellant insists, moreover, that the district court also erred in finding that the Southern Railway Company did not exercise such control over Lenoir Car Works as to require a determination that the railway company was the employer of appellant within the meaning of the Federal Employer's Liability Act.

In a carefully considered opinion, the United States District Court found that there was no evidence that the Southern Railway Company dictated the management of the Lenoir Car Works, although it owned the entire capital stock of that corporation. It was found that the evidence indicated that an individual, Henry Marius, was in full control of the operation of the car works. He established prices and handled all negotiations and collective bargaining agreements. Lenoir paid local taxes, had local counsel, and maintained workmen's compensation.

The district judge noted that "a substantial part of its requirements in the field of operation of Lenoir were bought elsewhere." Lenoir sold substantial quantities of its product to other companies than Southern; it operated no rolling stock; and had nothing to do with the transportation business.

The court found further that the facts did not reveal such intimacy and inseparability of control as would lead to the conclusion that the Southern Railway Company and Lenoir Car Works were one and the same. Lenoir was not, in the words of the Federal Employer's Liability Act, "a common carrier by railroad"; it was not performing the non-delegable duties of a railroad; it was not the

operator of a terminal; and it performed no switching or transportation functions at all. It was, distinctively a manufacturer, performing no common-carrier operations.

Upon the issue of whether or not the control by Southern of Lenoir was of such character as to constitute the latter a mere adjunct of the former, the court held that no such control was evident. The following cases were cited: **Kentucky Electric Power Co. v. Norton Coal Mining Co.**, 93 F. (2d) 923 (C. A. 6); **Atlantic Coast Line v. Shields**, 220 F. (2d) 242, 246 (C. A. 5); **Taylor v. Standard Gas and Electric Co.**, 96 F. (2d) 693 (C. A. 10).

In **Kentucky Electric Power Company v. Norton Coal Company**, supra, this court said: [page 926] "On the other hand, it is likewise well settled that a corporation is ordinarily an entity, separate and apart from its stockholders, and mere ownership of all the stock of one corporation by another, and the identity of officers of one with officers of another, are not alone sufficient to create identity of corporate interest between the two companies or to create the relation of principal and agent or to create a representative or fiduciary relationship between the two. If such stock ownership and potential control be resorted to only for the purpose of normally participating in the affairs of the subsidiary corporation in a manner usual to stockholders and not for the purpose of taking some unfair advantage of the subsidiary or using it as a mere adjunct to the main corporation or as a subterfuge to justify wrongdoing, their identity as separate corporations will not be disregarded but their respective rights when dealing with each other in respect to their separate property will be recognized and maintained. The extent of stock ownership and mere potential control of one company over another has never been regarded as the determining factor in the consideration of such cases. Something must be disclosed to indicate the exercise of undue domination or

influence resulting in an infringement upon the rights of the subservient corporation for the benefit of the dominant one. Otherwise, the rights of the separate corporations in respect to their corporate property must be governed by the rules applicable in ordinary cases. [Citing cases.]"

The district court concluded that, upon the principles of the **Kentucky Electric Power Company case**, the control of Southern Railway Company over Lenoir Car Works was not such as constituted Lenoir an adjunct of Southern. We think this conclusion was correct.

Accordingly, the judgment of the district court dismissing the complaint herein is affirmed.

JUDGMENT COURT OF APPEALS

(Filed April 22, 1960.)

United States Court of Appeals
For the Sixth Circuit.

No. 13,975.

W. H. Garrett,
Appellant,

vs.

Southern Railway Company,
Appellee.

Before: McAllister, Chief Judge; Martin, Circuit Judge; and Holland, Senior District Judge.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

s/ John D. Martin,
United States Circuit Judge.